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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. TIEN NGUYEN, Defendant and Appellant.	H043625 (Santa Clara County Super. Ct. No. C1247076)

I. INTRODUCTION

Defendant Tien Nguyen appeals after a jury found him guilty of second degree murder (Pen. Code, § 187, subd. (a))[1] and found true the allegation that he personally used a deadly and dangerous weapon, a knife, during the commission of the offense (§ 12022, subd. (b)(1)). The trial court sentenced defendant to 16 years to life.

Defendant contends on appeal that the trial court erred when it did not suppress the statements he made to police after he invoked his right to counsel and when it denied his request to modify the jury instruction on murder. For reasons that we will explain, we will affirm the judgment.

[1] All further statutory references are to the Penal Code unless otherwise indicated.

II. FACTUAL AND PROCEDURAL BACKGROUND

A. *Prosecution Case*

On December 20, 2012, Christine Bangalan, who was known by her nickname Joy, graduated with a nursing degree from San Jose State University. Her brother, Steve Bangalan, threw her a graduation party at The Agency, which was his business in San Jose. Joy's classmates, cousins, and friends were invited.[2] Steve and his friend Marius Alhambra were already there when Joy arrived.

At some point, Steve became frustrated because his property was getting damaged in the revelry. Steve got up on a table and yelled at the partygoers to calm down. While Steve was on the table, Joy's friend Raffee Cordero and her classmate Andy Lee got into an argument. They yelled at and shoved each other, but a group of friends, including Marius, separated them. Andy then began to persistently contact Raffee to apologize. Andy was being belligerent, and Raffee did not accept Andy's apologies.

Andy had invited several people to the party, including Kelvin Lee, James Lee, and defendant.[3] Kelvin thought it was disrespectful for Raffee to refuse Andy's apologies and defendant told Kelvin that he wanted to confront him. Kelvin and James followed defendant and saw Raffee in the parking lot. Raffee and Marius had taken a walk outside.

Defendant approached Raffee and Marius and asked several times if they had a problem with Andy. Raffee responded, "What the fuck are you?" Defendant punched Raffee at least five times. Kelvin hit him, too. James threw multiple punches, but did not know if he hit Raffee or Marius. Raffee tried to block the punches and fell to the ground. Defendant continued to hit Raffee and also kicked him. At some point while he was on the ground, Raffee heard someone say, " 'Stab him.' " Raffee screamed for help. Marius

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[2] As several of the people involved in the incident have the same last names, we will use first names for clarity.

[3] Kelvin and James testified under grants of immunity.

tried to push the attackers away, but he was shoved to the ground. After Marius got up, he tried to pull Raffee away. Defendant pulled a knife from his pocket and told Marius, " 'Hey, this has nothing to do with you. I'll stab you.' "

Catherine Mante, who had also graduated with a nursing degree, was chatting in the parking lot with Steve and her boyfriend, Julian Monsalud, when Julian pointed out a group of about five people fighting near a dumpster. Steve ran towards the group and Catherine and Julian followed. Marius saw Steve run up and immediately heard a smashing sound, like a glass being thrown at someone. Marius and Raffee ran toward The Agency.

Steve contacted defendant. Kelvin thought Steve hit defendant on his head with something. James heard a crack and glass breaking, and thought he saw Steve with a broken bottle in his hand. Kelvin punched Steve. Steve started to advance, so Kelvin backed up and kicked Steve twice in the torso. Julian then pulled Steve away in a bear hug, and Kelvin saw that defendant had a knife. Steve said he was going to grab a gun.

Steve, Julian, and Catherine ran back inside The Agency. Julian smelled blood, his hands felt wet, and his shirt looked dark like it was soaked in blood. He called for help and put Steve on the ground. Catherine pulled off Steve's sweater and saw what looked like a stab wound. The wound was approximately two inches long and a couple centimeters wide. Steve was bleeding and yelling in pain. Catherine and several others performed first aid and stayed with Steve until paramedics arrived.

Steve was dead when he arrived at the hospital. The cause of death was a stab wound to Steve's right abdomen. The wound was consistent with a single-edged instrument. Steve had also been bleeding inside the top right side of his head.

Meanwhile, Kelvin, James, and defendant had gone to Kelvin's house. Defendant's hand was injured and bloody. Defendant reached into his pocket, took out a knife, and threw it on the counter.

The knife later tested positive for blood. A DNA profile was developed from the blood located where the blade met the handle. The profile was a mixture of at least two people and defendant was determined to be a possible contributor to the profile. Defendant was also determined to be the major contributor to the DNA profile developed from the biological material located on the knife's handle.

Police did not find any glass fragments at the scene.

San Jose Police Detectives Stewart Davies and Craig Storlie interviewed defendant on December 21, 2012. Defendant had a cut on his wrist. Defendant said that three guys approached him out of nowhere and that he got hit in the face really hard and then blocked a bottle with his hand. He also stated that he hit a guy. At the end of the fight someone said, " 'I'm gonna get my gun,' " and that's when everyone started leaving. Defendant said that he did not think he was in danger until the person said he was going to get his gun. Defendant went straight to his car and was driven home.

Police recorded a conversation between defendant's girlfriend, Carina Tsang, and defendant at the police department. Defendant admitted to Carina that he had a knife, but said he "didn't do it." He also said, "I don't remember doing it." When Carina asked how he was cut, defendant stated that he did not remember but that Kelvin told him he was hit with a bottle. Defendant told Carina that he got the knife when he was cutting limes while drinking tequila and that he used the knife to scare some guys.

Police later searched defendant's home. Inside a trash can outside the residence, police found a trash bag containing blood-stained clothing and gauze. Inside of the utility room, police located a black sweater and jeans that looked recently laundered and had bleach stains.

B. *Defense Case*

Defendant testified on his own behalf. Defendant stated that he went to the graduation party with his girlfriend Carina, Carina's sister Miranda, and Michael

Gutierrez. Defendant was too drunk to drive, so Michael drove defendant's car. Andy also attended the party.

At the party, defendant drank beer and tequila with salt and limes. The tequila, salt, limes, and a knife were on a table in the front room. Defendant cut the limes.

At some point Steve got on the table and told everyone to shut up. Steve also told people to start moving to the back. Defendant grabbed some shot glasses and the tequila and moved them to a table in the back room. Defendant put the knife in his pocket and then got distracted by the sound of an argument. It sounded like Andy's voice. As soon as defendant put the glasses and tequila down, he went to the front and saw Andy and Raffee arguing. They were also pushing and shoving each other. It looked like Raffee had a bloody lip. Raffee was angry and was yelling at Andy, and Andy laughed while Raffee yelled at him.

When the altercation broke up, defendant pulled Andy to the back. Raffee remained in the front room and seemed very upset. Andy went to try to apologize to Raffee, but Raffee refused the apology in "[k]ind of an angry manner." Raffee went outside and defendant followed him. Defendant was upset and mad, and intended to get Raffee to accept Andy's apology. If Raffee did not accept the apology, defendant intended to punch him in the face, but he did not intend to stab Raffee. Defendant did not think about the knife in his pocket.

Defendant confronted Raffee by some dumpsters. Kelvin and James were with defendant and Marius was with Raffee. Defendant asked Raffee if he was cool with Andy. Raffee ignored him. Defendant then asked Raffee in an angry manner if he had a problem with Andy. Raffee responded, " 'Fuck Andy. What the fuck are you[?]' " Defendant struck Raffee, knocking him to the ground. Raffee got up and defendant knocked him down again. Marius tried to push defendant off of Raffee several times. The first time, defendant told Marius not to get involved. When Marius tried again,

defendant pulled out the knife and told Marius not to get involved and that it had nothing to do with him. Marius did not listen and picked Raffee up.

Defendant was holding the knife when he saw Steve come up by his side with his right arm raised above his head. Steve tried to hit defendant in the head. Defendant blocked the blow with his left hand, which was cut by something Steve was holding. Defendant could not see what was in Steve's hand. In response to getting hit, defendant stabbed Steve. Defendant thought he was in danger and just reacted. He intended to stab Steve because he had just been injured and was hurt. After he struck Steve he backed off. He saw Steve fighting with Kelvin and saw Kelvin kick Steve. It felt like everything happened all at once.

Julian and his girlfriend arrived and Julian pulled Steve away while Steve struggled. Steve did not appear to be injured. When Julian pulled Steve away, Steve said he was going to grab a gun and shoot them. Defendant grabbed Kelvin and ran toward his car because he thought somebody was going to get shot.

Defendant went to Kelvin's house. He put the knife on the kitchen counter while he was looking for his keys. When he took the knife out of his pocket he was surprised and shocked at everything that had just happened. Michael picked him up and took him home.

On cross-examination, defendant admitted that he stabbed and killed Steve on December 21, 2012. Defendant stated that he pointed the knife at Marius and that the knife was still in his hand when Steve came up. Defendant thought he was punched in the face during the fight.

C. *Charges, Verdict, and Sentence*

Defendant was charged with murder (§ 187). It was also alleged that defendant personally used a deadly and dangerous weapon, a knife, during the commission of the offense (§ 12022, subd. (b)(1)).

On October 15, 2015, a jury found defendant guilty of second degree murder and found the deadly and dangerous weapon allegation true. The trial court sentenced defendant to 16 years to life.

III. DISCUSSION

A. *Non-Suppression of Defendant's Statements to Police*

Defendant contends that the trial court failed to suppress the statements he made to homicide detectives after he invoked his right to counsel. Defendant asserts that the court erroneously found that his invocation was unclear and that the detectives' interrogation techniques were not deceptive and coercive. The Attorney General counters that the trial court's findings are supported by the record and that defendant's claim regarding the detectives' interview techniques has been waived.

1. Factual Background

Defendant was interviewed at the San Jose Police Department by Detective Stewart Davies and Detective Craig Storlie on the afternoon of December 21, 2012. Detective Davies read defendant his *Miranda*[4] rights at the beginning of the interview. Defendant acknowledged that he understood his rights and began to answer the detectives' questions. Defendant told the detectives that he went to a party and that a fight broke out outside. Defendant said that he got hit in the face and blocked a bottle with his hand, and that three guys came out of nowhere. When the detectives began to ask for specifics, defendant stated that it was dark and he was really drunk and did not remember anything. The following exchange then occurred:

"[DEFENDANT]: But I did have a question though.

"[DETECTIVE] DAVIES: Go ahead.

"[DEFENDANT]: Uh, you said all – anything I say can be used against me, right?

"[DETECTIVE] DAVIES: Mm-hm. Do you . . .

[4] *Miranda v. Arizona* (1966) 384 U.S. 436 (*Miranda*).

"[DEFENDANT]: And . . .

"[DETECTIVE] DAVIES: . . . need me to read 'em again or . . .

"[DEFENDANT]: Yeah, can you read it again?

"[DETECTIVE] DAVIES: Sure. You – you have the right to remain silent. You understand, right?

"[DEFENDANT]: Yeah.

"[DETECTIVE] DAVIES: Anything you say may be used against you in court. You understand?

"[DEFENDANT]: Yeah.

"[DETECTIVE] DAVIES: You have the right to the presence of an attorney before and during any questioning. Do you understand?

"[DEFENDANT]: Yeah.

"[DETECTIVE] DAVIES: And if you cannot afford an attorney, one will be appointed for you free of charge before any questioning, if you want.

"[DEFENDANT]: Could you read that last one?

"[DETECTIVE] DAVIES: If you – the . . .

"[DEFENDANT]: The – the one before what you just read.

"[DETECTIVE] DAVIES: You have the right to the presence of an attorney before and during questioning. Do you understand?

"[DEFENDANT]: Yeah, so can I have an attorney present?

"[DETECTIVE] DAVIES: If you would like one, we can stop questionin' and . . .

"[DEFENDANT]: I dunno. I just see this in the movies all the time.

"[DETECTIVE] DAVIES: This – this is your call. This is . . .

"[DETECTIVE] STORLIE: (Unintelligible.)

"[DETECTIVE] DAVIES: . . . I mean we read these to you. If you understand, you understand them.

"[DEFENDANT]: (Unintelligible.)

"[DETECTIVE] DAVIES: And it's your choice of what you wanna do.

"[DEFENDANT]: Uh . . .

"[DETECTIVE] DAVIES: We can continue – we can – we can do whatever you wanna do.

"[DEFENDANT]: Uh, uh . . .

"[DETECTIVE] DAVIES: I'm not an attorney.

"[DEFENDANT]: (Unintelligible.)

"[DETECTIVE] DAVIES: He's not an attorney.

"[DEFENDANT]: (Unintelligible.)

"[DETECTIVE] DAVIES: I can't advise you – on, on your – on – on what to do.

"[DEFENDANT]: This is my first time, I don't know what to do, but I see it in the movies. They always have – they always bring an attorney in . . . [.]"

Detective Davies told defendant that "movies are movies" and that he did not have "a lawyer in [his] back pocket," so a lawyer would not be brought "right away." Detective Davies said that they would "either continue talking or . . . stop talking," but that he could not tell defendant what to do, he could only advise him of his rights, and it was purely up to him.

Detective Davies told defendant that the only way they were going to determine what happened was by talking to people who were there. Defendant responded, "But what I'm saying is . . . what if it's not 100% accurate 'cause, uh, I was drunk like – I was . . . pretty drunk. . . ." Detective Davies stated, "We're gonna take into consideration everybody's level of intoxication"; "we're gonna collect evidence"; and "we're gonna piece it all together, and we're going to come up with a conclusion." The following exchange then took place:

"[DEFENDANT]: So what – what if I want an attorney now, uh, what would happen?

"[DETECTIVE] STORLIE: We stop questioning you.

"[DEFENDANT]: Would I just be trapped in this room again? 'Cause this room is drivin' me nuts – so I've been here for long.

"[DETECTIVE] DAVIES: Yeah, they're probably – I mean . . .

"[DETECTIVE] STORLIE: It's gonna take us a little bit to get some paperwork done, but, uh . . .

"[DETECTIVE] DAVIES: We – we would definitely have somebody take a look at your wrist. Um . . .

"[DEFENDANT]: Would it be free?"

Detective Storlie stated that no one there could treat his wrist and Detective Davies said they would probably have to take defendant to the hospital. The detectives and defendant then talked about the wound and what could have caused it, and defendant resumed telling the detectives about the incident. Detective Davies asked defendant if after getting hit he felt he was in danger. Defendant responded, "Mm, no, I . . . only thought I was in danger when . . . the guy yelled out, 'I'm gonna get a gun and shoot somebody.' And then – yeah, I kinda booked it after that." When the detectives began to ask defendant who was with him, the following exchange occurred:

"[DEFENDANT]: Maybe I think I'll be – I'll feel better with an attorney. I feel like I'm saying all the wrong things or somethin'.

"[DETECTIVE] DAVIES: Are you tellin' me the truth?

"[DEFENDANT]: Huh? Yeah, but I feel like I'm – I feel like you guys are twisting my words.

"[DETECTIVE] DAVIES: No, no, no, I'm trying to figure out . . . what other people are tellin' me too. I'm trying to – it's like puzzles, right?

"[DEFENDANT]: Mm-hm.

"[DETECTIVE] DAVIES: So I'm trying to get the right pieces to fit into this puzzle . . .

"[DEFENDANT]: Mm.

"[DETECTIVE] DAVIES: . . . that's gonna fill in everything.

"[DEFENDANT]: Mm."

Detective Davies next asked defendant whether there were three "other people and two of you," and defendant proceeded to answer additional questions about the incident.

2. Trial Court Proceedings

Defendant did not file a written motion to suppress his statements, but during a hearing on the in limine motions, defendant requested the trial court to "review[] the transcript of the [police] interview . . . to decide whether or not he invoked his rights under *Miranda*." (Italics added.) The parties agreed that the court could review the video recording and the transcript of the interview.

At a subsequent hearing, the trial court raised "the issue of the invocation of the right to counsel by [defendant]" and indicated that it had viewed the recording and read the transcript. The court stated, "For most of the interrogation, there were two officers. And there were occasions when there was just one officer present. [¶] The general tenor of the interrogation was respectful, low key, no pressure tactics that the Court could detect, either in voice inflection or the appearance of defendant . . . . [¶] For the most part, the officers had their backs and heads to the camera. So the Court could not detect any facial expressions by them, but could see the facial expressions of [defendant] and didn't see anything during the course of the interrogation that manifested fear on the part of or intimidation on the part of [defendant]."

The trial court noted the portions of the interview where defendant asked about having an attorney present and quoted the transcript at length. The court determined that "the invocation was equivocal and not an invocation of the right to counsel." The court stated that it had found "no coercion that . . . defendant, had difficulty in deciding whether to exercise his right."

Neither party made an argument or stated an objection.

3. Legal Principles

" 'In order to invoke the Fifth Amendment privilege after it has been waived,[5] and in order to halt police questioning after it has begun, the suspect "must *unambiguously* " assert his [or her] right to silence or counsel. [Citation.] It is not enough for a reasonable police officer to understand that the suspect *might* be invoking his [or her] rights. [Citation.] Faced with an ambiguous or equivocal statement, law enforcement officers are not required under *Miranda*, *supra*, 384 U.S. 436, either to ask clarifying questions or to cease questioning altogether.' [Citations.]" (*People v. Suff* (2014) 58 Cal.4th 1013, 1068 (*Suff*).)

Thus, after an initial waiver, to invoke the right to counsel an individual " 'must articulate his [or her] desire to have counsel present sufficiently clearly that a reasonable police officer in the circumstances would understand the statement to be a request for an attorney.' [Citations.]" (*Nelson*, *supra*, 53 Cal.4th at p. 376.) "[W]hile 'requiring a clear assertion of the right to counsel might disadvantage some suspects who—because of fear, intimidation, lack of linguistic skills, or a variety of other reasons—will not clearly articulate their right to counsel although they actually want to have a lawyer present,' it is the *Miranda* warnings themselves, which—when given to the suspect and waived prior to questioning—are ' "sufficient to dispel whatever coercion is inherent in the interrogation process." ' [Citation.]" (*Id.* at p. 377.)

"[T]he standard of review—like the standard applicable in the trial court—focuses on 'whether, in light of the circumstances, a reasonable officer would have understood a

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[5] Defendant does not claim that his initial acknowledgment of his *Miranda* rights and his subsequent willingness to answer questions did not constitute a valid waiver. (See *People v. Nelson* (2012) 53 Cal.4th 367, 375 (*Nelson*) [defendant implicitly waived his *Miranda* rights by acknowledging that he understood those rights and then willingly answering questions].)

defendant's reference to an attorney . . . to be an unequivocal and unambiguous request for counsel, without regard to the defendant's subjective ability or capacity to articulate his or her desire for counsel, and with no further requirement imposed upon the officers to ask clarifying questions of the defendant.' [Citations.]" (*Nelson, supra,* 53 Cal.4th at p. 380.) "In reviewing a trial court's *Miranda* ruling, we accept the court's resolution of disputed facts and inferences and its evaluations of credibility, if supported by substantial evidence, and we independently determine, from the undisputed facts and facts properly found by the trial court, whether the challenged statement was illegally obtained. [Citation.]" (*People v. Bacon* (2010) 50 Cal.4th 1082, 1105 (*Bacon*).)

4. Analysis

We determine that a reasonable police officer would not have understood any of defendant's statements to be an unequivocal and unambiguous request for an attorney. (See *Nelson, supra,* 53 Cal.4th at p. 376.) All of defendant's statements regarding counsel contained equivocal or ambiguous language and defendant repeatedly and freely resumed discussions with the detectives about the incident.

After Detective Davies read defendant his rights for a second time at defendant's request, defendant asked the detective to repeat the right to counsel. After the detective did so, defendant asked, "Yeah, so can I have an attorney present?" The detective responded, "If you would like one, we can stop questionin[g] . . . ." Defendant said, "I dunno. I just see this in the movies all the time." The detective told defendant it was his choice. Defendant stated, "This is my first time, I don't know what to do . . . ." Detective Davies said that they could either continue talking or stop talking and that he could not advise defendant on what to do. The detective then spoke of his investigative process and defendant asked, "[W]hat if I want an attorney now, . . . what would happen?" Detective Storlie told defendant that questioning would stop. Defendant asked if he would be "trapped in th[e] room . . . ." Detective Storlie said it would "take . . . a little bit to get some paperwork done . . . ." Discussions regarding the incident resumed

until defendant said, "Maybe I think I'll . . . feel better with an attorney. I feel like I'm saying all the wrong things . . . ." Detective Davies asked defendant whether he was telling the truth and told defendant he was trying to piece the puzzle together. He then asked defendant a specific question about the incident, which defendant answered. Discussions resumed again.

Statements similar to defendant's have been found to be equivocal or ambiguous by the California Supreme Court. For example, in *Bacon*, *supra*, 50 Cal.4th at page 1105, the court determined that the statement, " 'I think it'd probably be a good idea for me to get an attorney,' " was not "sufficiently clear in and of itself" because it "contains several ambiguous qualifying words ('I think,' 'probably,' and 'it'd')." In *People v. Crittenden* (1994) 9 Cal.4th 83 (*Crittenden*), overturned on other grounds in *Crittenden v. Chappell* (9th Cir. 2015) 804 F.3d 998, the court held that the defendant's question, " 'Did you say I could have a lawyer,' " was not an unequivocal request for an attorney and was not an invocation of *Miranda* rights. (*Id.* at pp. 123, 130-131.) Similarly, in *People v. Johnson* (1993) 6 Cal.4th 1, the court held the defendant's statement, " 'Maybe I ought to talk to my lawyer, you might be bluffing, you might not have enough to charge murder,'" was not a sufficient invocation. (*Id.* at pp. 27, 30, overruled on other grounds in *People v. Rogers* (2006) 39 Cal.4th 826, 878-879; see also *People v. Shamblin* (2015) 236 Cal.App.4th 1, 20 (*Shamblin*) [the Court of Appeal determined that the "defendant's statement—'I think I probably should change my mind about the lawyer now. . . . I think I need some advice here'—contains language that is conditional ('should') and equivocal ('I think' and 'probably')"].) Here, defendant repeatedly asked the detectives what would happen if he invoked his right to counsel and told them that he did not know what he wanted to do. Neither questions about the consequences of invocation nor statements of uncertainty constitute requests for counsel.

Moreover, defendant continued to talk freely to the detectives after referencing his right to counsel and stating that he did not know what to do. After defendant first asked

about whether he could have an attorney present and stated that he had "see[n] it in the movies," defendant voiced his concern that his intoxication level during the incident might affect his ability to be accurate and asked whether medical treatment of his wrist would be free. He then spoke with the detectives about how he may have gotten the injury and resumed telling them about the incident. He subsequently referenced his right to counsel again, but immediately returned to speaking about the incident after Detective Davies said that he was trying to puzzle together what had happened. "[T]hat defendant did not intend to terminate the interview is clear from the exchange that immediately followed" his references to counsel. (*Shamblin*, *supra*, 236 Cal.App.4th at p. 20.) In view of defendant's statements of uncertainty regarding whether he wanted a lawyer and his ongoing willingness to talk, it was reasonable for the detectives to interpret the statements as equivocal. (See *Nelson*, *supra*, 53 Cal.4th at p. 382.)

Defendant focuses on his question, "Yeah, so can I have an attorney present?" Defendant argues that "[t]he correct answer was 'yes,' " and analogizes this case to *Sessoms v. Grounds* (9th Cir. 2015) 776 F.3d 615, 626 (*Sessoms*). In *Sessoms*, the defendant inquired seconds after the detectives entered the interview room, " 'There wouldn't be any possible way that I could have a—a lawyer present while we do this?' " (*Id.* at p. 617.) The defendant then stated that his dad had told him to ask for a lawyer. (*Id.* at p. 618.) The detectives responded by "convinc[ing] [the defendant] that his accomplices had already told them what had happened, and impressed upon [the defendant] that the only way to tell his side of the story was to speak to the officers then and there, without an attorney. Only after talking with him, softening him up, and warning him about the various 'risks' of speaking with counsel did the detectives read [the defendant] his *Miranda* rights . . . ." (*Ibid.*)

Here, in contrast, defendant asked about counsel *after* he was read his *Miranda* rights and waived them. The distinction is critical. "Whereas the question whether a waiver is knowing, intelligent, and voluntary calls for an evaluation of the suspect's state

of mind, the same cannot be said for determining whether a suspect's *postwaiver* statement requires the immediate cessation of police questioning. [Citation.]" (*Nelson*, *supra*, 53 Cal.4th at p. 376, italics added.) " 'To avoid difficulties of proof and to provide guidance to officers conducting interrogations, this is an objective inquiry. [Citation.] Invocation of the *Miranda* right to counsel "requires, at a minimum, some statement that can reasonably be construed to be an *expression of a desire* for the assistance of an attorney." [Citation.]' [Citation.]" (*Ibid.*, italics added.)

Detective Davies read defendant his *Miranda* rights at the outset of the interview and defendant waived those rights when he acknowledged them and began answering questions. (See *Nelson*, *supra*, 53 Cal.4th at p. 375.) When defendant later asked, "Yeah, so can I have an attorney present," Detective Davies responded, "If you would like one, we can stop questionin[g] . . . [.]" Defendant immediately equivocated, responding, "I dunno," and Detective Davies told him that it was his choice. Defendant continued to equivocate. It was clear from this exchange that defendant's question was not " ' "an expression of a desire for the assistance of an attorney." ' " (*Id.* at p. 376.) Even standing alone, we would not interpret defendant's question regarding whether he could have an attorney present as an unequivocal and unambiguous invocation of the right to counsel. (See *Crittenden*, *supra*, 9 Cal.4th at pp. 130-131.) "[D]efendant did not unequivocally state that he wanted an attorney, but simply asked a question." (*Id.* at p. 130.)

Defendant also contends that the detectives' interview techniques were coercive because the detectives insinuated that voluntary intoxication was a mitigating factor and preyed on defendant's "anxiety about his isolation and on his claustrophobia." The Attorney General asserts that any claim regarding coercive and deceptive tactics has been waived because defendant did not raise it below.

" 'Once a suspect has been properly advised of his rights, he may be questioned freely so long as the questioner does not threaten harm or falsely promise benefits.

Questioning may include exchanges of information, summaries of evidence, outline of theories of events, confrontation with contradictory facts, even debate between police and suspect. . . . Yet in carrying out their interrogations the police must avoid threats of punishment for the suspect's failure to admit or confess particular facts and must avoid false promises of leniency as a reward for admission or confession. . . .' " (*People v. Holloway* (2004) 33 Cal.4th 96, 115.) "The use of deceptive statements during an investigation does not invalidate a confession as involuntary unless the deception is the type likely to procure an untrue statement. [Citation.]" (*People v. McCurdy* (2014) 59 Cal.4th 1063, 1088 (*McCurdy*).) "[A] statement is involuntary and inadmissible when the motivating cause of the decision to speak was an express or clearly implied promise of leniency or advantage." (*Ibid.*)

Based on our review of the record, we conclude that defendant did not claim in the trial court that the police used coercive and deceptive tactics, which would have rendered his statements involuntary. (See *McCurdy*, *supra*, 59 Cal.4th at p. 1088.) Rather, defendant asked the trial court to "review[] the transcript of the [police] interview . . . to decide whether or not he invoked his rights under *Miranda*." (Italics added.) Accordingly, to the extent that defendant contends that his statements were involuntary based on the interview tactics employed, defendant's claim has been waived. (See *People v. Benson* (1990) 52 Cal.3d 754, 770, 782, fn. 5 [defendant who claimed in the trial court that confession was involuntary because detective commented that " '[t]here's no death penalty here,' " could not raise on appeal "other arguments attacking other aspects of the interrogation (e.g., 'psychological coercion,' 'deception,' and 'threats')."].)

To the extent that defendant contends the detectives used unlawful interview techniques to "talk [him] out of his request for counsel," we have determined that defendant did not unequivocally and unambiguously invoke his right to counsel such that the detectives were obligated to " 'ask clarifying questions or to cease questioning altogether.' [Citations.]" (*Suff*, *supra*, 58 Cal.4th at p. 1068.) Moreover, Detective

Davies arguably tried to clarify whether defendant was requesting counsel when he told defendant, "If you would like [an attorney], we can stop questionin[g] . . . ." Finally, having viewed the recording of the interview and read the transcript, we conclude that none of the detectives' statements were "likely to procure an untrue statement" by defendant or that defendant was motivated to speak to the detectives based on a promise of leniency. (*McCurdy*, *supra*, 59 Cal.4th at p. 1088.)

In sum, given defendant's equivocation and his continued willingness to talk freely with the detectives, we conclude that the trial court properly declined to suppress defendant's statements because " 'a reasonable police officer in the circumstances' " would not have understood defendant's references to counsel " 'to be a request for an attorney.' " (*Nelson*, *supra*, 53 Cal.4th at p. 376.)

B. *Murder Jury Instruction*

Defendant contends that "the absence of imperfect self-defense is an element of murder" and therefore "it should have been included among the elements listed in the murder [jury] instruction." Defendant asserts that his right to due process and a fair trial were violated by the trial court's denial of his request to modify the pattern jury instruction on murder (CALCRIM No. 520) by adding a fourth element to the offense, namely, that "[h]e did not kill in . . . [imperfect] self-defense."

1. Trial Court Proceedings

During a conference on jury instructions, defendant provided the trial court with a modified version of CALCRIM No. 520, which is the pattern instruction on murder. As relevant here, CALCRIM No. 520 states that "[t]he defendant is charged [in Count ___] with murder [in violation of Penal Code section 187]. [¶] To prove that the defendant is guilty of this crime, the People must prove that: [¶] 1. The defendant committed an act that caused the death of (another person/ [or] a fetus); [AND] [¶] 2. When the defendant acted, (he/she) had a state of mind called malice aforethought(;/.) [AND]
[¶] 3. (He/She) killed without lawful (excuse/[or] justification).]" Defendant requested

the court to add a fourth element to the instruction as follows: "4. He did not kill in the heat of passion or without [*sic*] imperfect self-defense."

Relying on *People v. Breverman* (1998) 19 Cal.4th 142, 189-190 (*Breverman*), defendant argued that the requested fourth element provided "a complete definition of malice." Defendant asserted that *Breverman* "stands for the proposition that the complete definition of malice is the intent to kill, which would be express[] [malice]; or the intent to do a dangerous act with conscious disregard of its danger, that would be implied malice; . . . plus the absence of both heat of passion and unreasonable self-defense. [¶] I believe that that is an element of murder and should be included as the fourth element that the District Attorney has to prove beyond a reasonable doubt." The district attorney responded that the requested instruction was superfluous because it was included in the instructions on manslaughter (CALCRIM Nos. 570 and 571).

The trial court denied defendant's request. The court determined: "[T]he jury will be instructed to read the instructions as a whole. And the Court believes that paragraph number 4 added by [defense counsel]—or . . . prong number 4, that he did not kill in the heat of passion or with imperfect self-defense, are more expansively considered and described in CalCrim 570 and 571, with respect to sudden quarrel and heat of passion in 570, and imperfect self-defense in 571. And they both setout [*sic*] the requirements that the District Attorney has to prove the negative. And it sets forth the consequence, in each one of those instructions, that if that is not done by the District Attorney, the jury must find the Defendant not guilty of murder. [¶] So I think that [the] suggestion, in [defense counsel's] version of 520, is covered in 570 and 571 of the CalCrim instructions."

As relevant here, the trial court instructed the jury on murder using CALCRIM No. 520 as follows: "The defendant is charged in Count One, with murder, in violation of Penal Code Section 187. To prove that the defendant is guilty of this crime, the People must prove that: [¶] 1. The defendant committed an act that caused the death of another

person; and, [¶] 2. When the defendant acted, he had a state of mind called malice aforethought; and, [¶] 3. He killed without lawful excuse or justification."

The trial court instructed the jury on voluntary manslaughter committed in imperfect self-defense or imperfect defense of another (CALCRIM No. 571) as follows: "A killing that would otherwise be murder is reduced to voluntary manslaughter if the defendant killed a person because he acted in imperfect self-defense. [¶] . . . [¶] The defendant acted in imperfect self-defense if: [¶] 1. The defendant actually believed that he was in imminent danger or being killed or suffering great bodily injury; and, [¶] 2. The defendant actually believed that the immediate use of deadly force was necessary to defend against the danger; [¶] 3. At least one of those beliefs was unreasonable. [¶] . . . [¶] . . . The People have the burden of proving beyond a reasonable doubt that the defendant was not acting in imperfect self-defense. If the People have not met this burden, you must find the defendant not guilty of murder."[6]

2. Analysis

Defendant contends that the trial court erred when it declined his request to add to the murder instruction that the prosecution had to prove that "[h]e did not kill in . . . imperfect self-defense" because malice is an element of murder and imperfect self-defense negates malice. Defendant asserts that the proposed language was necessary to inform the jury in the context of murder that "the prosecution had the burden of proving [he] did not act with an actual but unreasonable belief in the need to defend himself." The Attorney General argues that the suggested language was redundant of the trial court's instruction on voluntary manslaughter committed in imperfect self-defense or

[6] The trial court also instructed the jury on voluntary manslaughter committed in the heat of passion (CALCRIM No. 570). Because defendant limits his claim on appeal to the trial court's instruction on murder as it related to voluntary manslaughter committed in imperfect self-defense, we do not set out the instruction on heat of passion voluntary manslaughter here.

imperfect defense of another (CALCRIM No. 571) and that the trial court was not obligated to give duplicative instructions.

" 'A defendant challenging an instruction as being subject to erroneous interpretation by the jury must demonstrate a reasonable likelihood that the jury understood the instruction in the way asserted by the defendant. [Citations.]' [Citation.] ' "[T]he correctness of jury instructions is to be determined from the entire charge of the court, not from a consideration of parts of an instruction or from a particular instruction." [Citations.]' [Citation.]" (*People v. Solomon* (2010) 49 Cal.4th 792, 822 (*Solomon*).) "The meaning of instructions is tested by 'whether there is a "reasonable likelihood" that the jury misconstrued or misapplied the law in light of the instructions given, the entire record of trial, and the arguments of counsel.' " (*People v. Fiu* (2008) 165 Cal.App.4th 360, 370 (*Fiu*).)

As defendant acknowledges, the trial court told the jury when instructing on voluntary manslaughter that the prosecution had to "prove beyond a reasonable doubt that [he] was not acting in imperfect self-defense. If the People have not met this burden, you must find the defendant not guilty of murder." Nevertheless, defendant asserts that "[m]entioning this element of murder in a manslaughter instruction was insufficient, because the jury could have found [him] guilty of murder without even considering the manslaughter instructions." This argument, however, overlooks the fact that the trial court read the entirety of the jury instructions to the jury before deliberations and gave each juror a copy of the instructions to "follow along" if so inclined. Moreover, "[j]urors are presumed able to understand and correlate instructions and are further presumed to have followed the court's instructions. [Citation.]" (*People v. Sanchez* (2001) 26 Cal.4th 834, 852.) Also, a trial court may generally refuse a proffered instruction that is duplicative. (*People v. Gurule* (2002) 28 Cal.4th 557, 659.)

In addition, in closing argument, the district attorney explained that "[i]f imperfect self-defense applies, murder can be reduced to manslaughter," and defense counsel

repeatedly told jurors that the district attorney had to prove beyond a reasonable doubt that defendant was not acting in imperfect self-defense. Defense counsel also stated that imperfect self-defense "negates malice and defines the crime of voluntary manslaughter."

Defendant relies primarily on *People v. Rios* (2000) 23 Cal.4th 450 (*Rios*) to argue that the absence of imperfect self-defense is an element of murder and that the trial court's murder instructions were incomplete. In *Rios*, the defendant claimed that "*the voluntary manslaughter instructions were prejudicially incomplete* because they omitted the voluntary manslaughter 'elements' that the killing must have occurred in a heat of passion upon sufficient provocation . . . , or in the actual but unreasonable belief in the need for self-defense . . . ." (*Id.* at pp. 453-454, italics added.) The California Supreme Court disagreed, determining that "neither heat of passion nor imperfect self-defense is an element of voluntary manslaughter that the People must affirmatively prove beyond reasonable doubt in order to obtain a conviction for that offense." (*Id.* at p. 454.) Rather, "where murder liability is at issue, evidence of heat of passion or imperfect self-defense bears on whether an intentional or consciously indifferent criminal homicide was malicious, and thus murder, or nonmalicious, and thus the lesser offense of voluntary manslaughter." (*Ibid.*, italics omitted.)

Although *Rios*, *supra*, 23 Cal.4th at page 454 states that where there is evidence of heat of passion or imperfect self-defense, "the People may have to prove the *absence* of provocation, or of any belief in the need for self-defense, in order to establish the malice element of murder," the case does not assist defendant because the court neither considered the sufficiency of the murder instruction, which is the issue defendant raises here, nor held that the jury instruction on murder must include as an element that the defendant did not act under a heat of passion or in imperfect self-defense. " 'It is axiomatic that cases are not authority for propositions not considered.' " (*People v. Avila* (2006) 38 Cal.4th 491, 566.)

Based on the trial court's instructions and the parties' arguments, we determine that there is not " 'a reasonable likelihood' " that the jury misconstrued or misapplied the law in the manner asserted by defendant and that the trial court did not err when it declined to give defendant's requested instruction. (*Solomon, supra,* 49 Cal.4th at p. 822; see also *Fiu, supra,* 165 Cal.App.4th at p. 370.)

IV. DISPOSITION

The judgment is affirmed.

_____
BAMATTRE-MANOUKIAN, J.

WE CONCUR:

_____
ELIA, ACTING P.J.

_____
MIHARA, J.